# THE LAW OF PROPERTY

*SUPPLEMENTAL READINGS*

**Class 05**

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CONCISE HORNBOOKS

PRINCIPLES OF

# Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ

THOMPSON
WEST

# Chapter 3

# GIFTS, INCLUDING BANK ACCOUNTS

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## SUMMARY

## § 3.1 Introductory Principles

1. A gift is a voluntary transfer of property by one person to another without consideration or compensation. The person who makes the gift is called the "donor" and the person to whom the gift is made is called the "donee."

2. A gift is a present transfer of an interest in property. The gifted interest can be either a present interest[1] or a future interest.[2] There is no necessity that the gift be of the entire interest in the property.

3. If the transfer is intended only to be effective in the future and to create no rights in another at the present time, it is a mere promise to make a gift and unenforceable in the absence of consideration.

4. A gift made in a person's will[3] does not take effect when the will is signed. It takes effect when the person dies unless

1. A present interest is an interest in property that is presently possessory by the holder of the interest. For example, a life estate is a present interest.

2. A future interest is an interest in property that is not presently possessory. It is an interest that will or may become possessory in the future. For example, if O gifts land to A for life, and then to B, B's interest is future since B's right to possession is postponed until A dies. See generally, Chapters 5 & 6.

3. A will is a legal document executed by a person who is called a testator.

between the time the will was signed and the person's death the will was revoked. Gifts made in wills are called bequests, legacies, or devises. The recipient of the gift in the will has no property right in the subject matter of the bequest until the testator dies.

5. A gift of property during the donor's lifetime is valid only if there was intent, delivery and acceptance.

## § 3.2 Intent to Make a Gift

Donative intent is determined primarily by the words of the donor. In doubtful cases, however, the court, in determining whether there was intent, will consider the surrounding circumstances, the relationship of the parties, the size of the gift in relation to the total amount of the donor's property, and the conduct of the donor towards the property after the purported gift.

## § 3.3 Delivery

1. Delivery is essential for a gift. The delivery requirement serves a ritualistic, evidentiary, and protective function.

2. The delivery must divest the donor of dominion and control over the property.

3. What constitutes delivery depends upon the circumstances. Ordinarily the delivery requirement is met if the donor turns over possession of the subject of the gift to the donee. This is sometimes called "manual delivery."

4. If the subject matter of a gift cannot reasonably be delivered manually, or the circumstances do not permit it, a symbolic or constructive delivery may suffice. In either of this cases, something, other than the subject matter of the gift, is delivered to the donee.

5. A delivery is symbolic when something is transferred to the donee in place of the subject matter of the gift; a constructive delivery is the transfer to the donee of the means of obtaining possession and control of the gifted property.

6. If the subject matter of the gift is already in the hands of the donee, delivery is not necessary.

7. A delivery to a third person on behalf of the donee is a sufficient delivery to satisfy the delivery requirement if the third person is acting as a trustee for the donee[4] and not an agent of the

Generally, to be valid a will must be signed by a testator and witnessed by at least two witnesses. Each state sets forth a number of formalities that must be followed by the testator and the witnesses for the will to be validly executed.

4. While some courts may refer to the third person as an agent of the donee, use of the word "trustee" is more appropriate. A person acts as an agent for another as the result of a consensual agreement to that affect between the agent and the principal. In this gift situ-

donor. Whether the person to whom the property is transferred is an agent of the donor or a trustee for the donee depends upon the facts and circumstances of the case.

## § 3.4 Acceptance

Acceptance by the donee is required for a valid gift. The donee may refuse to accept since one cannot have property thrust upon him in an inter vivos transaction against his will. However, acceptance generally is presumed if the gift is beneficial to the donee.

## § 3.5 Inter Vivos or Causa Mortis

1. A gift may be either inter vivos or *causa mortis*.

2. An inter vivos gift is an irrevocable transfer of property made to the donee during the donor's lifetime.

3. A gift *causa mortis* is one made in contemplation of the donor's imminent death. It is revocable by the donor at any time before the donor dies and is automatically revoked if the donor does not die from the anticipated peril. The gift *causa mortis* becomes absolute on the donor's death from the anticipated peril if the donee survives the donor and the donor had not revoked the gift.

## § 3.6 Joint Bank Accounts

1. Joint and survivorship bank accounts when effectively created permit either party to exercise control over the deposited funds during their lifetimes. At the death of one party, the entire balance belongs to the survivor.

2. Joint and survivorship bank accounts frequently are used for the purpose of directing the devolution of funds on the death of the depositor. The effectiveness of these accounts to accomplish that purpose where one of the parties is the sole depositor depends, in part, upon the governing state law and the facts as to the particular joint bank account.

3. The validity of a joint bank account to pass title to property to the surviving joint tenant by means that are essentially testamentary without complying with the Statute of Wills is supported by either the contract or gift theory.

a. In a jurisdiction following the contract theory of joint bank accounts, the survivor is entitled to the proceeds of the account simply because the contract between the deceased depositor and the bank so provides.

ation, the donee may have no knowledge of the transfer to the third person or even the third person's identity. Thus, it is inappropriate to characterize the third person as the donee's agent.

b. In a gift theory jurisdiction, the noncontributing survivor is entitled to the account if he can establish that a gift was effected by which he acquired an interest in the account when it was created. The requirements of donative intent, delivery, and acceptance must be proved. The subject matter of the gift is an interest in the account during the joint lives of the depositors and not the entire proceeds of the account. The finding of a gift is facilitated when both parties make deposits and withdrawals during the joint lives. Any inference of a gift is rebutted by a finding that the account was created in both names merely for the convenience of the principal depositor and that there was no intent to make a gift.

## § 3.7 Tentative Trust Accounts and POD Accounts

1. A bank account in the name of the depositor "as trustee for another" is a valid bank account trust so that on the death of the depositor the proceeds of the account belong to the named beneficiary. These tentative trusts are revocable at any time during the life of the depositor and are commonly referred to as "Totten trusts." Typically, assets in a Totten trust are subject to the claims of the depositor's creditors during his life and at his death. However, in some states creditors of the estate must first be paid with assets from the deceased depositor's probate estate.

2. POD accounts are bank accounts made payable on death to one other than the depositor (a so-called "POD account"). These tend to function much like Totten trusts.

### PROBLEMS, DISCUSSION AND ANALYSIS

*§ 3.2 Intent to Make a Gift*

**PROBLEM 3.1:** F wrote his son S a letter stating: "I give you my Y painting for your 21st birthday but I am retaining possession of the painting until I die." At F's death the executor of F's estate claims that the painting is properly an asset of F's estate. S claims the painting is his. Who is correct.[5]

**Applicable Law:** In order to make a valid gift there must an intent to transfer an interest in the gifted property to the donee at the present time. The interest can be an absolute interest or less than an absolute interest such as either a life estate or a future interest. Gifts of future interest are valid.

5. Gruen v. Gruen, 68 N.Y.2d 48, 505 N.Y.S.2d 849, 496 N.E.2d 869 (1986).

### Answer and Analysis

S is correct. In order to make a valid gift there must be intent, delivery and acceptance. The intent must be to make a gift of some interest in the gifted property at the present time, whether that interest be a present interest or a future interest. A donor may gift a future interest and retain the present interest in the gifted property. Here, for example, F's letter reflects his intent to gift a future interest in the painting to S, while retaining a life estate in the property for himself. The gift of the remainder interest is immediate and vests title in the donee subject only to the retained life estate in the donor.

Since the donor intends to retain possession of the painting until his death, actual delivery of the painting to S would be inappropriate and inconsistent with the nature of the gifted interest, a remainder interest in the painting. The best delivery under the circumstances would be a symbolic delivery such as the letter F sent to S.

**PROBLEM 3.2:** F, an elderly man but in good health, endorsed a stock certificate over to his daughter, D, placed the stock certificate in an envelope, and delivered the envelope to B, saying that it "should be delivered to D in case of my death." Sometime later, F died and the stock certificate was delivered by B to D. The administrator of F's estate brings an action to recover the stock or its value from D. May the administrator succeed?[6]

**Applicable Law:** An inter vivos or *causa mortis* gift may be made by delivery to a third party for the donee. If the directions to the third party are to deliver the subject matter to the donee on the death of the donor, meaning whenever and however such death should occur, and the donor presently intends to divest himself of ownership and control of the gifted interest, then, regardless of how the contingency is expressed, the transaction constitutes a valid inter vivos gift. An interest vests presently in the donee even though possession and enjoyment are postponed. The relationship is similar to that of fee simple ownership and executory interest, or life estate and remainder.

### Answer and Analysis

The answer is no but a contrary answer is possible. The facts suggest a somewhat ambiguous transaction, and the result depends upon how the court construes F's intent. Since F was suffering no ill health and was not facing an immediate peril, it is clear that no

6. Innes v. Potter, 130 Minn. 320, 153 N.W. 604 (1915).

gift *causa mortis* was intended. The general awareness of the inevitability of death is insufficient to support a gift *causa mortis*.

The delivery requirement of a gift is satisfied by delivery to a third person for the benefit of, or for further delivery to, the donee if the donor intends the third party to act as trustee for the donee. Thus, the only question, and the crucial one in this case, is the intent of the donor at the time he delivered the stock certificate to B.

The directions were to deliver the stock to D in case of F's death. Did F mean that D was to get the stock and all interests therein only at the death of F and nothing before? If so, the transaction is testamentary and ineffective because of noncompliance with the Statute of Wills. The direction to deliver "in case of death" sounds as if death is a condition precedent, and hence the transfer should be ineffective. Death, however, is inevitable, and the only contingency is time. If the directions were to deliver "on my death" instead of "in case of my death," the transaction would not be testamentary since death is certain to occur. The difference is explained in the next paragraph, but in the meantime, it may be noted that an ordinary layperson is just as likely to use the expression "in case of death" as use "upon my death," or "when I die."

In the event that a donor transfers personal property to a third person to be delivered to a donee on the death of the donor, meaning whenever and however the donor may die, then the donor has effectively divested himself of sufficient dominion and control over the property. The inevitability of death makes it certain that the full title eventually will vest in the donee. The situation is analogous to delivery of deeds to real estate upon the donor's death and can be construed as vesting presently a future interest in the donee. The relationship can be categorized as that of a life estate in the donor with a future interest (called a "remainder") in the donee. Title to the property passes to the donee but the donee's possession and enjoyment is postponed until the donor dies. In the case of a gift of stock, therefore, the fact that the donor collects dividends during his life, or votes the stock, is immaterial since these are rights that are essentially equivalent to the possession of real estate. There is a valid gift which takes effect immediately on transfer of the subject matter to the third party, and on the donor's later death, the future interest previously vested in the donee becomes possessory.

Thus, in this problem, if the donor's intent can be construed as meaning that the donee is to get the stock on the death of the donor, no matter when or how that event occurs, then the gift is complete on the delivery of the stock to B, and a future interest

vests at once in the donee. The fact that the donor said "in case I die" instead of "when I die" should not be too significant because of a lack of appreciation of the legal differentiation. Further, natural conceit or reluctance to accept the inevitability of death may lead to the use of a contingent expression when in fact such inevitability is recognized. After delivery to B, F in fact exercised no dominion or control over the stock other than that which was consistent with the reservation of a life estate. Therefore, F made a valid gift of a future interest to D and the administrator of F's estate cannot recover the stock as the stock is properly D's and not an asset of F's estate which would have been the case if the gift was ineffective.

*§ 3.3 Delivery*

**PROBLEM 3.3:** O desired to give D 100 bearer bonds of the X Corporation which O kept in her safe deposit box at the local bank. Since it was Sunday and O could not get to her box, she gave D the key to the box and told D to go to the box on Monday and take the bonds. D takes the bonds from the safe deposit box on Monday. One week later O dies and the executor of O's estate seeks to recover the bonds from D. Who wins?

**Applicable Law:** The delivery requirement can be satisfied by a delivery of the subject matter of the gift to the donee or by a delivery of something else to the donee which either symbolizes the gift (symbolic delivery) or gives the donee a means to gain access to the gift (constructive delivery). Generally, neither symbolic nor constructive delivery can be used if the subject matter of the gift can be conveniently delivered to the donee. The delivery requirement serves a ritualistic, evidentiary, and protective function. The ritual of delivery reenforces to the donor the seriousness and finality of the act of transferring possession of property to another and protects the donor from the consequence of inadvised oral statements. Delivery also serves as objective evidence that a transfer has actually occurred.

**Answer and Analysis**

D wins. The executor of O's estate can win only if the gift was ineffective. If that were true, then D, who is in possession of the bonds, would be required to turn them over to the executor to be distributed to the persons entitled to O's estate. On the other hand, if the gift were effective, D could keep the bonds.

In order to make a valid gift there must be intent, delivery, and acceptance. There appears to be no dispute that O intended to give the bonds to D. Rather, the issue is whether there has been a sufficient delivery under the facts and circumstances. The facts

indicate that it was not possible for O to retrieve the bonds and give them to D on Sunday. Therefore, if there was a good delivery it had to be a constructive delivery evidenced by the delivery of the keys to the safe deposit box to D. These keys give D the means to acquire possession of the bonds. This delivery should be sufficient.

Delivery of only the keys to a safe deposit box might not be a sufficient delivery of the bonds in the box if D could obtain entry to the box only with both a key and the signature of O on a access card, and D had never taken possession of the bonds prior to O's death.

**PROBLEM 3.4:** O, in accordance with her custom of the past five years, desired to give her son, S, and her daughter, D, a Christmas gift of $1,000,000. In order to make this gift O decided to transfer to each child 8,000 shares of Stock X worth $992,000 and $8,000 in cash. O's 16,000 shares of Stock X were kept in S's safe deposit box; S had a general power of attorney from O as to all the stock in S's vault.

After O, vacationing in California, had communicated to S her desire to make these gifts, S's bookkeeper in New York wrote to S, by then also in California, suggesting a plan whereby 8,000 shares of Stock X, together with $8,000 in cash would be credited to the accounts of each S and D. O approved the plan and then authorized S to send a telegram "Credit 8,000 shares of Stock X to each of S and D as indicated in your letter." The bookkeeper credited the accounts of S and D accordingly. Each entry indicated that the transfer as to the stock had already taken place. O died prior to the transfer of any cash to S and D.

Under state law, death taxes are payable on decedent's property owned at death. Did O own the 16,000 shares of Stock X and the $16,000 of cash at the time of her death?[7]

**Applicable Law:** In order to make a valid gift of personal property there must be a donative intent, delivery, and acceptance. Acceptance is generally presumed if the gift is beneficial. Manual delivery of the subject matter of the gift is not required

7. See In re Mills' Estate, 172 App. Div. 530, 158 N.Y.S. 1100 (1916), affirmed 219 N.Y. 642, 114 N.E. 1072 (1916) (the donor, living in California, instructed his son in New York to present $1,000,000 each to himself and to the donor's daughter, of which $16,000 was cash and the rest in stock, the court held there was sufficient delivery of the stock to the son to support an inter vivos gift to the son as well as a sufficient delivery of the stock to the son for the benefit of the daughter to support an inter vivos gift to the daughter, given that the son had general power of attorney).Compare, Bickford v. Mattocks, 95 Me. 547, 50 A. 894 (1901) (Donor delivered the property to his attorney as the agent of the donor for the purpose of delivering it to the donee but attorney neglected to deliver the property to the donee, the delivery to the donor's agent was not a delivery to complete the gift to the donee).

in all circumstances and delivery can be satisfied by a constructive or symbolic delivery. Further, where actual transfer of possession would serve no useful purpose, or where it would be impossible or a vain and useless act, it is not required. Thus, if the intended donee is already in possession of the subject matter of the gift as bailee of the donor, no further delivery is necessary. In this case, release to the bailee with the proper donative intent is sufficient.

Delivery can be made to a third party for the benefit of a donee if the donor intends to constitute the third party as trustee for the donee. If the intended trustee is already in possession of the subject matter of the gift because, for example, he'd previously been designated as the donor's bailee, no further delivery would be required. In this case, re-characterizing the bailee's role as trustee for the intended donee is sufficient.

**Answer and Analysis**

O did not own the 16,000 shares of Stock X at her death but did own the $16,000 of cash.

The traditional rule is that for a valid gift there must be both a donative intent to make a gift and a valid delivery of the subject matter of the gift. Delivery of a deed of gift, however, will satisfy the requirements of a delivery of the subject matter itself. The policy behind the rule requiring delivery is to protect alleged donors from fraudulent claims of gifts based only on parol evidence.

The requirement of delivery to the extent it entails an actual transfer of the personal property has been considerably diluted over the years. The nature of the delivery requirement depends in a large measure upon the circumstances of each case. Where actual transfer of possession is either impossible or ridiculous, various substitutes have been recognized as sufficient. For example, if the subject matter of the gift is already in the possession of the intended donee, as here where the donee is a bailee of the donor, then the law does not require the donee to redeliver the items to the donor to have him transfer them back to the donee. Under such circumstances, the requirement of delivery is obviated, and all that is necessary is donative intent. Under these circumstances, the requirement of delivery is usually satisfied by a clearly expressed intent that the title, or a portion thereof, be presently transferred to the donee.

In this problem, S was in possession as bailee of all the stock of his mother, the donor, O. The stock certificates were physically located in New York, but the donor and S, one of the donees, were in California. As to S, physical delivery was not only unnecessary

but actually impossible. Therefore, as to his gift, any further delivery is unnecessary and all that is required is a complete manifestation of intent to transfer title at the present time. This was done by the telegram, and further, the book entries were actually made indicating that a transfer had taken place. Accordingly, there was a completed gift as to S.

The validity of the gift to D, however, rests upon additional principles. Delivery need not be made to the donee; it can be made to a third party for the donee's benefit. If there is an absolute transfer of possession to a third party to act as trustee for the donee, the fact that the donee is unaware of the transfer is immaterial. In the absence of evidence to the contrary, acceptance by the donee is presumed. In gifts to third parties for donees, what is required is a transfer of possession of the subject matter of the gift, and a clear manifestation of intent to make a gift. In this problem S is already in possession of the stock of the donor. Thus, in common with the analysis concerning the gift to S, any further delivery at this time is not only unnecessary but also impossible. All that is required is a clear manifestation of intent to release to S the beneficial interest in the stock for the benefit of the donee, D. This was clearly done as evidenced by the telegram and by the book entries before O's death. Therefore, there was a completed gift of the stock to both S and D.

The cash transfers needed to complete the respective gifts are a different matter. No entries were made upon O's books showing actual payment of this amount until after her death, and the telegram manifesting an intent to make a present gift only referred specifically to the stock. Thus, there is insufficient evidence to show an inter vivos gift of the cash.

Since state law taxes only decedent's property owned at death, the cash but not the stock is subject to death taxes.

**PROBLEM 3.5:** M was admitted to the hospital to undergo major surgery. Before entering the operating room M wrote a note to F stating that cash would be found in a various places in their home and this money, together with two bank books, were for F. The letter concluded as follows:

> God be with you. Please look out for yourself. I cannot stay with you. My will is in the office of my Lawyer. There you will find out everything.

Your loving wife,
M

M placed the note in the night table beside her hospital bed and asked a nurse to tell F about it. Later in the day while

M was still unconscious, F came to the hospital and was told about the note. F read the note, went home, found the cash and bank books and has retained them ever since. M died nine days later. Under her will, M left F $1 and the balance of her estate to her children and grandchildren. In the suit by her personal representatives F claims ownership of the cash and bank books on a gift *causa mortis*. The trial court held there was no gift. On appeal, what result?[8]

**Applicable Law:** In order to make a valid gift, inter vivos or *causa mortis*, there must be intent, delivery, and acceptance. Many courts carefully scrutinize *causa mortis* gifts because if valid they circumvent the policies underlying the Statute of Wills that transfers that are not complete until death should be evidenced by a writing that is witnessed by at least two witnesses.

### Answer and Analysis

A gift *causa mortis* is essentially a testamentary act and, as such, represents an invasion of the policies underlying the Statute of Wills designed to avoid fraudulent transfers. In some states they are not favored. Accordingly, in such states transactions that might be classified as gifts *causa mortis* must be closely scrutinized.

The first issue is whether there had been sufficient delivery. One must consider whether the note was a sufficient delivery of the cash and bank books or whether manual delivery of these items was required. While some courts would hold that the delivery of the note was a sufficient symbolic delivery of the cash and bankbooks under these facts (neither money or bankbooks immediately available to M), in *Foster*, the court concluded that the delivery of the note was not sufficient to complete the gift. In the case of the bank books the court concluded that delivery of the passbooks rather than the notes would be required. Said the court: "In the case of a savings account, where obviously there can be no actual delivery, delivery of the passbook or other indicia of title is required." Then the court concluded: "Here there was no delivery of any kind whatsoever. We have already noted the requirement so amply established in our cases ... of 'actual, unequivocal and complete delivery during the lifetime of the donor, wholly divesting her of the possession, dominion, and control' of the property. This requirement is satisfied only by the *donor*, which calls for an affirmative act on her part, not by the mere taking of possession of the property by the donee."[9] This analysis is suspect. First, to suggest there can be no actual delivery of a bank account is wrong. The

8. Foster v. Reiss, 18 N.J. 41, 112 A.2d 553 (1955).

9. Id. at 50–51, 112 A.2d at 559.

donor can take the donee to the bank, withdraw the money and hand it to the donee. Courts have long recognized that as an alternative there can be a constructive delivery of the account by delivering the passbook to the donee, and the majority recognizes this. If delivery of the passbook can be a constructive delivery, why cannot a letter have the same effect?

Further the court rejected the notion that the note was an authorization for the husband to take delivery of the property consummating the delivery. The court reasoned that the note failed as an authorization "since at the time he took the note from the drawer the decedent was under ether and according to the findings of the trial court unable to transact business until the time of her death."[10] The agent's authority terminates, the court concluded, when the principal has no capacity. This rationale is peculiar. M's intent was not to make F her agent, it was to make him her donee.

The court also rejected the notion that the donee already had possession of the gift property making delivery unnecessary because the gift property was in the family home. Even if delivery is dispensed with where the donee has possession of the property, the court stated that in this case the house was decedent's property and although the husband resided in the house he did not know the property was in the house or its exact location.

The court then noted that the intent requirement is separate from the delivery requirement. Strangely, the court stated: "Although the writing established her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement for a gift *causa mortis*."[11] Thus, the court was willing to achieve an intent-defeating result by stringently construing the requirement of delivery in the context of a gift *causa mortis*.

The dissent decried the result. "Although the honesty of the husband's claims is conceded and justice fairly cries out for the fulfillment of his wife's wishes, the majority opinion ... holds that the absence of direct physical delivery of the donated articles requires that the gift be stricken down." The dissenters then cited Chief Justice Stone's article[12] that the reasons for the delivery requirement, while perhaps historically justified, are no longer true and "courts should evidence a tendency to accept other evidence in lieu of delivery as corroborative of the donative intent." It characterizes the delivery requirement as widely entrenched and perhaps advisable as "a protective device to insure deliberate and unequivocal conduct by the donor and elimination of questionable or fraudu-

10. Id. at 54–55, 112 A.2d at 561.

11. Id. at 52, 112 A.2d at 560.

12. Stone, Delivery in Gifts of Personal Property, 20 Col. L. Rev. 196 (1920).

lent claims." Nonetheless, it should not be so strictly applied under the facts of this case where the donative intent is clear. Furthermore, given the setting in which M apparently decided to make the gift to F, M's only reasonable alternative was to write F a note since neither the cash nor the bank books were in M's possession or readily available to her.

### § 3.5 *Inter Vivos or Causa Mortis*

**PROBLEM 3.6:** Prior to undergoing an operation for the removal of a life threatening tumor, D delivered to X various pieces of jewelry with instructions to give them to named donees "in the event of my death from the operation." After making an incision, the surgeon decided that removal of the tumor was too dangerous and then sewed up D's wound. One week later D, who was aware that the tumor was not removed, was released from the hospital. Thereafter, D died from the tumor. Between the time D was released and the time she died, D expressed a continuing desire that the named donees should receive the items of jewelry that still remained in X's possession. Although advised by her attorney that the gifts were probably no longer valid, D did nothing to change the nature of the deposit or to make a will bequeathing the jewelry either to the intended donees or to anybody else. After D's death, the personal representative of D's estate brought an action to recover the items of jewelry from X. The administrator claimed that the gifts of jewelry were ineffective and therefore the jewelry was properly an asset of D's estate. Is the administrator correct?

**Applicable Law:** Gifts are divided into two principal categories: inter vivos and *causa mortis.* A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril. It can also be revoked by the donor at any time prior to the donor's death. Most courts construe gifts *causa mortis* as taking effect immediately but subject to an implied condition subsequent that the gift is revoked if the donor recovers. Other courts disregard or minimize formal distinctions dependent upon the manner of expression when a donor purports to make a gift *causa mortis,* since the expression "if I die," expressing a condition precedent, is more likely to be used than the more appropriate words expressing a condition subsequent. A gift *causa mortis* made in contemplation of death from an operation is revoked automatically if the operation is not performed even though death comes later from the underlying cause.

### Answer and Analysis

The personal representative can recover the property from X. Gifts are divided into two principal categories: inter vivos and *causa mortis*. A gift inter vivos is absolute and unconditional. It takes effect at the time of delivery and cannot be revoked by the donor. A gift *causa mortis* is made in contemplation or apprehension of death as a result of an existing peril. It is not absolute but conditional upon the donor's death. It also is revocable by the donor at any time before the donor's death and is revoked automatically if the donor recovers from the peril. For a valid gift *causa mortis*, the peril of the death that is contemplated must be immediate and specific. A concern for the normal vicissitudes of life is not sufficient.

A fully effectuated *causa mortis* gift is dependent or conditioned on the death of the donor. Some courts require that the condition be a condition subsequent rather than a condition precedent in order to meet the general requirement that a valid gift requires an intent to transfer an interest in the property presently and not merely in the future. Whether the condition is precedent or subsequent, however, has engendered considerable verbal gymnastics and subtle rationalizations. The difficulty with construing the gift as being subject to the condition precedent of the donor's death is that if the gift doesn't take effect until the death of the donor, then it is too late for the donor to make a gift in this manner since the donor can only direct the transmission of property after death by means of a will. This would require compliance with the state's Statute of Wills.

Most jurisdictions construe gifts *causa mortis* as transferring title presently but subject to revocation on recovery by the donor or earlier if the donor changes her mind. Under this rationale, the gift becomes absolute on removal of the conditions subsequent. In effect, the gift operates thus: "This item is yours, take it now and enjoy it, but if I recover from this peril, I want it back." The difficulty of requiring the donor's intent to be expressed in this manner is that most donors would not be aware of the distinction between conditions precedent and subsequent, and in fact most donors would most likely express the gift in terms of a condition precedent, e. g., "I want you to have this if I die." Thus, some courts may utilize the condition subsequent analysis but liberally construe statements accompanying the transfer of the subject matter of the gift as evidencing a gift *causa mortis* although grammatically they may in fact be expressed in terms of a condition precedent. Some courts simply repudiate the distinction. Here, the facts support an intent by D to make a gift *causa mortis* by delivering property to a third party acting as trustee for the intended donees.

The donor wanted the items to be delivered to the donees "in the event of my death from the operation." The facts show that the donor did not die from the operation and the donor made a sufficient recovery to return home from the hospital. D, in fact, died from the tumor. The immediate peril, as evidenced by D's statement to X, that motivated the gifts was the *operation.* Since D did not die on the operating table, the gift was revoked. The donor did have time after returning home to draft a will or to make an inter vivos gift of the jewelry to the intended donees, neither of which D did. Therefore, D's personal representative may recover the items since the gift was revoked.

If D had stated to X at the time D delivered the jewelry to X: "give these to the donees in the event of my death," the donees might have a strong argument that the peril D feared was death from the tumor, not merely death during the operation. This argument would support the donees because D did die from the tumor even though it was after D had been released from the hospital.

It also might be argued that D's later statements to X that the donees should receive the property resulted in an inter vivos gift to them. This assumes X is the trustee for D's intended donees.

Suppose the donor dies of a different peril from the one that motivated the gift. For example, what if D died in the hospital from pneumonia contracted after the operation and while D was recovering. If D intended to make a gift only if she died during the operation, then the gift was automatically revoked when the operation ended. On the other hand, the phrase "in the event of my death from the operation" may be a surrogate for "if I don't come home from the hospital." As so construed, the gift would not be revoked.[13]

**PROBLEM 3.7:** On December 23, 1998, A suffered a severe and disabling heart attack from which A remained hospitalized for approximately two months. On March 23, 1999, A gave a note for $10,000 to a trusted employee, B. On the note, A penned in the following words, "Only Good In Case of Death." Due to A's incapacity, A could only return to work on a part time basis. A died on October 16, 2001 of "acute pulmonary edema, arteriosclerotic heart disease and chronic congestive heart failure." After A died the administrator of A's estate refused to pay B the $10,000. B sued the administrator claiming there was a gift *causa mortis.* Can B succeed?[14]

13. See Ridden v. Thrail, 125 N.Y. 572, 26 N.E. 627 (1891).

14. Fendley v. Laster, 260 Ark. 370, 538 S.W.2d 555 (1976).

**Applicable Law:** A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril.

### Answer and Analysis

B cannot succeed. There is no difficulty in finding that the subject matter of the gift has been delivered by the donor to the donee at a time when the donor was under the apprehension of death from some existing disease; both requirements of a valid gift *causa mortis*. The difficulty comes with the requirement that the donor must not recover from his infirmity. A finally died of his heart ailment but more than two years after delivery of the gift to B. The fact that A did leave the hospital and showed some interest in his business is at least convincing evidence that A "recovered" from the depth of the disease that caused A to be concerned about chances of prolonged life. B's claim against the estate must fail.

## § 3.6 *Joint Bank Accounts*

**PROBLEM 3.8:** A opened a savings account in the names of "A and B as joint tenants with the right of survivorship." Both A and B signed the signature cards which provided that the funds in the account were payable to "A or B or to the survivor." A kept possession of the passbook. All deposits to, and withdrawals from, the account were made by A. After A's death, B withdrew all the funds from the account, and A's administrator then brought an action against B to recover the funds withdrawn. May the administrator recover?

**Applicable Law:** Joint and survivorship bank accounts, when created by only one of the depositors contributing the funds, are analyzed either on the basis of a contract or gift theory, depending upon the jurisdiction. According to the contract theory, the depositors and the bank stand in a contractual relationship and either depositor or the survivor, after the death of one of the parties, is entitled to deposit or withdraw funds, including the entire amount. Under this approach, the survivor is entitled to the funds remaining simply on the basis of the contract.

Under the gift theory, the non-contributing survivor is entitled to the account only if the contributing depositor did in fact intend to make an inter vivos gift of an interest in the account to the other. The requirements of donative intent, delivery, and acceptance must be satisfied. The subject matter of the gift is not of the entire funds in the account but simply of a co-interest therein.

**Answer and Analysis**

No. Joint bank accounts are in common usage and are the frequent subject of litigation. When one of the parties makes all of the deposits and exercises complete control over the account during his lifetime, the courts follow either one of two theories in determining the rights of the survivor after the death of the cotenant who made the deposits. These theories are the contract theory and the gift theory.

The contract theory is predicated on the proposition that a bank deposit constitutes the bank a debtor. Then, when the depositor orders the bank to pay himself or another upon the order of either party, and secures the signature of the second party evidencing an assent to the arrangement and notifies him of the completed transaction,[15] there is created in the second party by contract a joint interest in the account equal to his own. Thus, under this theory, B is entitled to the funds simply because this was the contract with the bank.

Under the gift theory, B, the survivor, gets the funds only if a valid gift was made. The requisites of donative intent, delivery, and acceptance must be shown. Acceptance causes little difficulty because of the presumption of accepting beneficial gifts and because of the signing of the signature card. Donative intent and delivery are more difficult problems. In order to sustain a gift, it is not necessary that the subject matter of the gift be the entire bank account or that the entire funds be delivered to the donee. In the joint bank account case, the intended gift and the subject matter thereof are an interest in the account, not the account itself. Delivery is sufficient if there is a vesting of an equal right to control, that is, to deposit and withdraw funds from the account. Thus, under the gift theory, B is entitled to the funds if A intended to vest in him presently an interest in the account, and if A did in fact give him an equal right of control. In cases such as this where no dispute arose until after the death of the donor-depositor, the form of the account constitutes prima facie evidence of the gift. Thus, if no rebuttal testimony is introduced, B will be allowed to keep the funds. If, however, it is shown that the alleged donee never made any deposits or withdrawals during the lifetime of the donor, that the donor did not intend him to have any such control, that the only purpose of the account was to pass it to the donee on the donor's death, that until then the funds were to be regarded solely as those of the donor, and that the account was put in both

15. Some courts have held that it is not necessary for the survivor to have signed the signature cards. See In re Stamets' Estate, 260 Iowa 93, 148 N.W.2d 468 (1967). A non-signing co-owner of the account could be viewed as a third-party beneficiary of the contract between the depositor and the bank. See also, In re Estate of Michaels, 26 Wis.2d 382, 132 N.W.2d 557 (1965).

names for the convenience of A, then no present gift was created and the administrator would be entitled to the funds. The degree of liberality with which the courts construe these accounts varies considerably. In this problem, however, since there are few, if any, facts to rebut the inference of a gift arising from the joint account, the decision should be in favor of B. That B did not in fact make any deposits or withdrawals is not conclusive that B had no right to do so.

### § 3.7 *Tentative Trust Accounts*

**PROBLEM 3.9:** A opened two savings accounts. Each passbook listed the ownership as "A in trust for B." A exercised full control over both accounts, making additional deposits and withdrawals whenever A desired. The money withdrawn was used by A for personal uses and A made no effort to account to B for any funds in the account. At one time one account had a balance of $10,000 but at A's death this account was closed. The other account had a balance of $15,000 at A's death. None of these funds had apparently come from the closed account. At the death of A, both B and A's administrator claimed the right to the proceeds of the remaining account and B also claimed the $10,000 that had been in the closed account. (1) As between the administrator and B, who is entitled to the proceeds of the active account? (2) May B recover from A's estate the $10,000 which was in the closed account?

**Applicable Law:** A bank account in the name of "A in trust for B" is valid as a tentative or revocable trust with the named beneficiary being entitled to the proceeds in the account, if any, upon the depositor's death. During the depositor's lifetime, however, the account is revocable by the depositor. This revocation can be evidenced merely by withdrawing funds from the account.

#### Answers and Analysis

B is entitled to the funds in the active account but may not recover the $10,000 from A's estate. Bank accounts in the name of the depositor in trust for another person ("A in trust for B") are widely used and are designed for the convenience of the depositor who controls the account during his or her lifetime. By naming a beneficiary the depositor also is able to designate who shall receive the funds in the account at the depositor's death. These accounts are sometimes called "poor persons' wills." They are, in effect, tentative trusts or trusts in which the depositor reserves the right to revoke. Clearly, no irrevocable trust is intended, but on the other hand, there is an intent that the beneficiary of the account has an interest in the account from the time that the account is opened. It

is thus a revocable trust with the grantor-depositor reserving complete control and power of revocation in whole or in part. Thus, when A withdraws money from an account or closes it entirely, A is in effect revoking the trust either pro tanto or completely. Until revoked, however, the beneficiary of the trust has a beneficial interest in the account similar to such an interest in a more formally prepared trust in which the settlor reserves the power to revoke.

Accordingly, the unrevoked account in trust for B became absolute on the death of A. At A's death A no longer had the power to revoke the account. Therefore, the entire beneficial and legal interest in the account vested in B. This is consistent with A's intent and unless some strong public policy should invalidate this type of arrangement, B should get the account. With respect to the closed account, however, B is not entitled to recover. The trust was only tentative or revocable, and A revoked this trust by closing the account. Therefore, B is not entitled to recover.[16]

Although B is entitled to the funds in the active account at A's death, B may take subject to the claims of A's creditors, if any. As a general rule, the funds on deposit in a Totten trust are liable for payment of the debts of the deceased depositor once the assets of the deceased depositor's estate have been exhausted.[17] Assets of the deceased depositor's estate include only property capable of passing by the deceased's will or by intestacy and do not include assets passing by reason of a Totten or tentative bank account trust.[18]

16. See Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904): "[a] deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act.... "; see also Uniform Probate Code § 6–104. Such tentative trust accounts are often called "Totten trusts."

17. See Unif. Prob. Code § 6–107.

18. See Brown on Personal Property 174–1888 (3d ed., Rauschenbush, 1975).

EXAMPLES & EXPLANATIONS

# Property

Second Edition

**Barlow Burke and Joseph Snoe**

ASPEN
PUBLISHERS

# 6

# *Gifts*

Gifts play an important role in life and law. We saw in Chapter 5 that a donee — the recipient of a gift — cannot be a bona fide or good-faith purchaser because she is not a "purchaser." Similarly, you will learn later in the course that the real estate recording acts do not protect donees the way they protect good-faith purchasers and creditors. Much of the complicated material in future interests soon to be discussed in the course begins with a gift or a bequest.

A ***gift*** is a noncontractual, gratuitous transfer of property. It is made without legal consideration. If there is consideration, the law of gifts does not apply. A transfer for consideration is a sale, and the rules of contracts apply.

There are two types of gifts: first, a gift between living persons is called an ***inter vivos gift***; a gift made on account of a donor's impending death is called a ***gift causa mortis***. A transfer of property by will after a person's death is called a ***devise*** or ***bequest*** and not a gift.

## Inter Vivos Gifts

An ***inter vivos gift*** is a gift between living persons. For an inter vivos gift to be effective between the giver (the donor) and the recipient (the donee), the donee must show three things: first, a clear and convincing intent in the donor to transfer the object to the donee (donative intent); second, the donor in most cases must actually deliver the object to the donee; and third, the donee must accept the object. Thus, the donor's donative ***intent***, plus physical ***delivery*** and ***acceptance***, are the three elements required for a valid gift.

### *(a) Donative Intent*

For a gift to be effective the donor must intend to make the gift. Mere delivery is not a gift. The delivery may have been part of a loan, or a bailment, for example. Courts are suspicious of claimed gifts, and will scrutinize the facts of a transfer to ensure that the donor had the requisite intent. The donee

bears the burden of proof to show that the donor had the donative intent. The evidentiary standard for the showing of donative intent — i.e., clear and convincing evidence — is high. Often vague terms evidence a transfer of an object, as when someone says, "Take charge of this." It should be, and will be, up to the alleged donee to show that a gift was intended. Thus the law's suspicion about gifts is soundly grounded in a skeptic's view that a person would not freely give away property.

Intent to make a gift and delivery usually occur simultaneously, but not always. If someone lends a book to a friend, but later discovers that he has two copies of it and says that the friend can keep the loaned copy, the donative gift exists; proving that a gift of the book was intended will be difficult, however, its delivery and the intent to deliver it being shown to exist at different times. Certainly the lender's statement that the friend can keep the book is evidence of a donative intent; while evidence after the time of delivery is admissible, it is not as convincing as evidence of intent at the time of delivery. On the other hand, when a donor says, "I'll give you the book next week," and does so, the evidence of intent shows an upcoming delivery, and acceptance that next week by the donee will complete the gift transaction. The latter transaction has completed the elements of the gift in a typical, nonsuspicious chain of events. In a third transaction, when the donor says, "I'll give the book to you, friend, if I find out that I have a second copy of it," there is no gift until there has been a delivery. A gift cannot be subject to a condition precedent (an act or event that must occur or not occur before the gift will be made or become effective).

Note that if the donor makes a gift of a book because he thought he had two copies of it and discovers after delivering the book that he did ***not*** have two copies of it, he cannot demand the book back. The gift was complete — and irrevocable — when the gift was accepted by the donee.

## *(b) Delivery*

***Delivery*** is a necessary element of a gift. Delivery usually is the actual physical delivery of the object. An agreement that a donor will transfer, and another receive, an object is insufficient for a delivery. A promise to make a gift is unenforceable by the donee, and the donor can decide not to make the gift (revoke the promise) anytime before delivery. The law otherwise would be akin to saying that, as a matter of contract law, an offer and acceptance without consideration constitute an enforceable contract. Similarly, a gift may be accomplished by the donor's first executing a deed of gift expressing a present intent to give, and then delivering the deed to the donee; the gift is complete once the deed is delivered, but not before.

When physical delivery is impossible (the chattel is large or heavy) or impractical (it is in the hands of a third party, or in a bailee's possession),

physical delivery is not required and courts have shown a willingness to recognize other types of delivery. In such circumstances, the delivery element may be satisfied by a symbolic delivery. A ***symbolic delivery*** occurs when the thing delivered stands in the place of the property. Symbolic delivery occurs, for example, when a picture of a large chest of drawers is delivered to the donee; that would be a symbolic delivery of the chest. Another example involves the delivery of one item, along with a written inventory of similar items: The one in such a situation stands for the many. Symbolic delivery in these situations might better be termed either a representational (in the former situation) or a representative (in the latter) delivery. Generally, a sale deed or deed of gift stands for the thing itself; likewise, a corporate share certificate stands for the interest in the entity.

A delivery may also be ***constructive***. The property itself is not transferred, but something giving access to and control over it is. Examples involve giving the keys to an automobile or the keys to a safe deposit box to the donee. Here a constructive delivery gives the donee access, or the means of exercising possession and control, over the chattel. Other examples of this type of delivery occur when the donee is already in possession, or has possession in some other capacity, as a bailee or employee. Actual delivery would be a fruitless action, one that most persons would not think worth taking.

Still another example of constructive delivery involves lost chattel, the donor giving instructions to the donee as to how to go about finding it; upon its recovery by the donee, the chattel has been constructively delivered. Likewise, a donor's revealing the hiding place of chattel is also its constructive delivery.

Intent and delivery are separate elements. Clear evidence of the donor's intention is needed to complete the gift. Although physical delivery is evidence of the intent to make the gift, delivery is only one bit of evidence and not a conclusive substitute for evidence of intent: It is too easy to obtain the keys to a chest, or a car, and claim it was the subject of a gift. This is particularly true when the donor is in ill health, is dying, or is otherwise unable to put his or her hands on the chattel at the moment. Constructive delivery only emphasizes that the rationale for the concept of delivery is to have the donor relinquish possession and control over the chattel.

### *(c) Acceptance*

For a completed gift, the recipient must accept the gift. Although a donee may refuse or reject a gift, acceptance in most situations is presumed from the benefit received by the donee; thus, acceptance has not been the subject of much reported litigation. Without evidence to show rejection, there is no rejection. The presumption of acceptance is a rebuttable one. No one is required to accept whatever "gift" someone else thinks would be to his or her benefit. No benefit or property may be forced on the unwilling.

## Gifts Causa Mortis

A ***gift causa mortis*** is made when the donor has an apprehension or expectation of his or her own impending death and delivers the chattel with the intention that control over the subject of the gift takes effect immediately, but becomes absolute only upon the donor's death. Jewelry is often the subject of gifts causa mortis.

The expectation of death required is subjective; an objective or reasonable expectation is not required. Whether the expectation of death is present is a question of fact. The illness, disease, or peril prompting the expectation must be objectively present, however. A threatened assassination, minor surgery, a perilous journey, and a perilous enterprise undertaken voluntarily have all traditionally been regarded as insufficient.

The donor must have a present intention to deliver absolute ownership of the property in the future, at death; an attempt by the donor to reserve control over the property until death invalidates this type of gift. Such an attempt would result in a gift (if recognized) that was subject to a condition precedent, and invalid as such. There is a presumption that a gift made while death is impending is a gift causa mortis, rather than a gift inter vivos. This presumption is rebuttable by proof of the donor's intention to part unconditionally over the property given.

The title of the donee causa mortis is not absolute until the donor is dead. Death must result from the same illness, disease, or peril producing the donor's initial expectation, not some other illness or event, although it is not necessary that the sole cause of the donor's death be the same as that causing the donor's expectation of death.

Meanwhile, the donee is the donor's bailee. Gifts causa mortis are revocable. In some jurisdictions, revocation is automatic if and when the donor recovers from the illness, accident, or other event that made death seem likely. Recovery is seen as a determinable event.[1] In some jurisdictions, however, a gift causa mortis is revoked only if the donor affirmatively revokes the gift after recovery. An automatically revoked gift causa mortis belongs to the donor as though no gift causa mortis had ever been made. The gift is not thereafter revived by a relapse or another, equally grave, illness. To illustrate, if just before heart surgery Mother gives her wedding ring to her youngest daughter at her bedside, and Mother survives surgery, Mother gets her wedding ring back. If Mother a month later dies from a heart attack or any other reason, Mother's wedding ring passes according to her will, and her youngest daughter has no superior claim to the ring because Mother at one time made the ring the subject of a gift causa mortis.

1. A determinable event (or condition subsequent) automatically terminates the donee's ownership and returns title to the donor without any action on the donor's part.

A person cannot make a gift causa mortis to escape the claims of creditors. Gifts causa mortis are subject to the claims of creditors when other assets of the donor are insufficient to repay the debts. Whether such gifts are subject to marital rights is generally a matter for state probate codes and statutes — and generalizations about this subject are hazardous. Real estate may not be the subject of a gift causa mortis.

The gift causa mortis is the functional equivalent of a devise (a transfer of property by will). Every state has enacted elaborate requirements in a Statute of Wills that must be fulfilled to give effect to a will or testamentary transfer. The gift causa mortis is thus an extraordinary power and, being in derogation of the jurisdiction's Statute of Wills, is not favored. A high standard of proof, that of clear and convincing evidence, is generally required to uphold such gifts. Courts are also likely to strictly construe statutes and cases upholding such gifts. As with inter vivos gifts, the judicial rationale for strictly construing the elements of this type of gift has to do with the evidentiary problems associated with them. In the instance of gifts causa mortis, however, the evidentiary problems are acute because the donor is dead.

# EXAMPLES

## Dresser Delivery

1. Is the giving of the keys to a dresser a symbolic or a constructive delivery?

## Revocation and Donative Intent

2. Owen executes an otherwise valid deed of gift. The deed contains a power to revoke. Does the power to revoke indicate a lack of donative intent sufficient to invalidate the gift?

## Christmas Carol

3. (a) In September Lee hands Peter a signed paper promising that Lee will give Peter 10,000 shares of Profit Corporation as a Christmas present. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

(b) In September Lee transfers 10,000 shares of Profit Corporation stock to Peter, with the qualification that Lee (the grantor) will receive all dividends paid by Profit Corporation on the stock on or before Christmas. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

### The Uncashed Check

4. Odysseus writes and signs a check to Don, drawn on Odysseus' checking account, but dies before Don cashes it. Does Don have a right to cash the check?

### Suicide and the Gift Causa Mortis

5. Ollie, contemplating suicide because of recent business and personal problems, executes a deed of gift of the contents of her safe deposit box to Del. Is suicide a life-threatening illness justifying a gift causa mortis?

### War

6. Fred is a member of the armed forces and is about to go to war. Is he contemplating death in the way required to make a gift causa mortis?

## EXPLANATIONS

### Dresser Delivery

1. Giving the keys may be a symbolic delivery of the piece of furniture, but could be a constructive delivery of the contents of the dresser, found in the drawers. These two concepts are easily confused, but both are useful means for courts to uphold a gift when there is sufficient evidence of donative intent but no actual delivery.

### Revocation and Donative Intent

2. No. If the deed adequately indicates a present donative intent — i.e., an intent at the time Owen delivered the deed to make a gift — the gift is good. The donee owns the property. Owen made the gift with a qualification, and retains the right to demand that the property be returned to him. The gift was complete and belongs to the donee until and unless Owen affirmatively revokes.

Some courts refuse to enforce revocation clauses as a matter of public policy. See dicta in Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) ("Once the gift is made it is irrevocable . . . and the donor is not an owner.") As you will learn, revocable trusts are common. A revocable trust arises when a grantor transfers property to a person (the trustee) to hold for the benefit of a third party (the beneficiary). The grantor can retain the right to revoke the trust and get the property back. If the revocable trust is permissible, the revocable gift should be permissible. The only reason to differentiate between the two is that revocation rights in a trust usually are in writing, whereas many gifts are oral.

## Christmas Carol

3. (a) Carol wins. Lee's promise is unenforceable because Peter gave no consideration. When Lee died, he was the legal owner and the stock passed according to his will.

(b) Peter keeps the stock. The gift in September was a present gift, with a present intent to make a gift, delivery, and acceptance. Lee's retaining the income for four months does not make the gift incomplete.

## The Uncashed Check

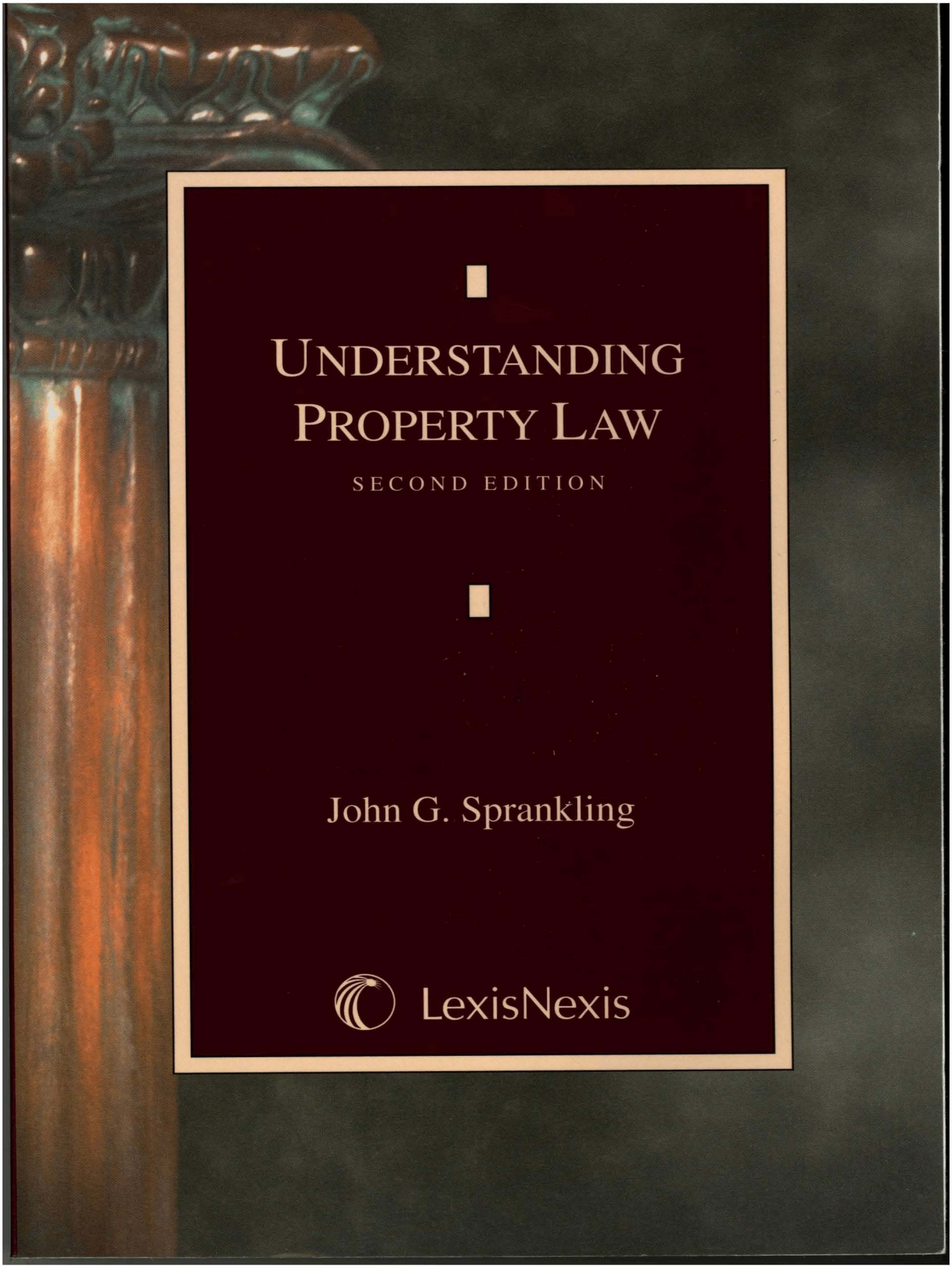
4. No. The donor could have stopped payment on the check any time before it was cashed, and the donor's death revoked the authority of the bank to cash it, so the gift was incomplete because of the donor's retention of a power to revoke the gift. The donor could have cashed a check and given the donee the money. The check is not a deed of gift, and the power to cash it is not the same as a gift. See Woo v. Smart, 442 S.E.2d 690 (Va. 1994) (holding that the delivery of a check is an incomplete assignment of the funds on account).

## Suicide and the Gift Causa Mortis

5. A person contemplating suicide has traditionally not been regarded as being in imminent peril of death sufficient to justify an exception to the Statute of Wills, so older authorities would answer this query in the negative. A suicide is traditionally an insane act. A few more recent cases reason that mental illness is just as pressing a backdrop for a gift causa mortis as physical illness; they hold that the contemplation of a suicide should be treated as one in contemplation of death. Scherer v. Hyland, 380 A.2d 696 (N.J. 1977). The analogy between a person facing major surgery (being allowed to make a gift causa mortis) and a suicide makes it difficult to deny a suicide donative power. The recent view is that some mental illnesses (e.g., depression) are accompanied by an irresistible urge to commit suicide, putting a person in contemplation of death. More generally, it might be said that if a jurisdiction recognizes (as most do) that a suicide may have testamentary capacity, a suicide's will becoming valid on that account, it should also be possible for a suicide to make a gift causa mortis.

## War

6. A person about to go to war is not facing an imminent peril giving rise to an expectation of death. There are, however, English cases to the contrary.



# UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

# Chapter 5

# GIFTS OF PERSONAL PROPERTY

SYNOPSIS



## § 5.01 Gifts in Context

The right to transfer property by gift is uniformly recognized as a fundamental right.[1] From the utilitarian perspective, legal recognition of a gift provides mutual benefits to both parties, thus optimizing social happiness; the donor derives altruistic satisfaction, while the donee receives the value of the item.[2]

This chapter examines gifts of personal property—both tangible personal property such as artwork, jewelry, and antiques, and intangible personal property such as copyrights and choses in action—made during the donor's lifetime; Chapter 28 examines the transfer of property at death. The rules governing gifts—once remarkably rigid—have been in transition for several decades, torn between the conflicting policies of certainty and donor autonomy. Concerned that judicial enforcement of the traditional "delivery" requirement may frustrate a donor's intent, modern courts increasingly

[1] *See* Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295 (1992).

[2] *See generally* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. Legal Stud. 411 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. Legal Stud. 401 (1991).

ignore or circumvent this standard. Under this emerging view, clear evidence of the donor's intent obviates the need for formal delivery.

## § 5.02 What Is a Gift?

A gift is a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*). Consider a hypothetical party celebrating B's birthday. Each party guest (donor) voluntarily presents a colorfully-wrapped package (gift) to B (donee), without receiving payment or other consideration; the transfer of ownership rights in the package to B is immediately effective. A transfer that takes effect in the future is not a valid gift; for example, a transfer effective upon the donor's death is governed by the law of wills, not the law of gifts.

The law recognizes two categories of gifts. The *gift inter vivos* is an ordinary gift made by one living person to another, as in the birthday example above; once made, it is irrevocable. The *gift causa mortis* is also a present gift between living persons, but one made in anticipation of the donor's imminent death; thus, if the donor survives the anticipated peril, the gift is revoked.

One scholar suggests that the boundaries between gift and two other types of property transfers—larceny (involuntary transfer without consideration) and sale (voluntary transfer for consideration)—may overlap.[3] If elderly R "gives" a valuable jewel to her young friend E, was the jewel given in exchange for the services that E has provided in caring for R, and hence more like a sale than a true gift? Or was this transfer the product of undue influence that E exerted over R, and thus like larceny?

## § 5.03 Gifts Inter Vivos

### [A] General Rule

There are three requirements for a valid gift inter vivos:

(1) *intent* (the donor must intend to make an immediate gift);

(2) *delivery* (the donor must deliver the gift); and

(3) *acceptance* (the donee must accept the gift).

In practice, intent is usually the most important element. The requirement of delivery is controversial; while still significant, it is being increasingly eroded by courts concerned that it may frustrate the donor's intent. Finally, acceptance of a valuable gift is usually presumed and thus rarely becomes an issue.[4]

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[3] Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295, 303 (1992).

[4] *See generally* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 Colum. L. Rev. 1876 (2001) (discussing how modern courts apply these elements).

## [B] Intent

The donor must intend to make an immediate transfer of ownership to the donee. The statements and actions of the donor usually provide the best evidence of intent. In *Gruen v. Gruen*,[5] for example, the donor's intent to transfer rights in a painting to his son as a birthday present was established in part by a letter that expressly stated: "I therefore wish to give you as a present the oil painting by Gustav Klimpt of Schloss Kammer."[6] Alternatively, intent may be inferred from the donor's act of giving possession of the item to the donee, the nature and value of the item, the relationship between the parties, and other circumstances.

If the donor intends the "gift" to take effect in the future (e.g., upon the donor's death), it is a nullity that confers no rights on the donee. Suppose R plans to produce a musical comedy, and tells E: "After my musical is produced, I'll give you 5% of my share of the profits." Because R intends a future transfer only, no gift results. But the requisite intent for a present transfer will be found if R states instead: "I give you 5% of my share of the future profits from the musical."[7]

Under the same logic, if a condition precedent must be fulfilled before a gift becomes effective, no immediate transfer has occurred and thus no gift will be found. But an invalid conditional gift may be enforceable as a valid contract. If R tells E, "when you bring me that photograph, I'll give you that rare stamp we discussed," R's statement could be seen as an offer for a unilateral contract, which E can accept through the act of bringing R the photograph. However, a gift that takes immediate effect may be made subject to a condition subsequent (e.g., "I give you this rare stamp, but if you don't visit me next week the gift will be void.").

Conditional gift issues arise most commonly in the special context of engagement presents. Suppose that M gives W an engagement ring, the engagement is later broken, and W refuses to return the ring. Who is entitled to the ring? Courts uniformly agree that an engagement ring is given subject to the implied condition subsequent of future marriage. Many courts still cling to the traditional view that the donor can recover the ring only if the engagement were dissolved by agreement or if the donee were at fault in breaking the engagement.[8] But a growing minority of courts follows a "no fault" approach to the issue, always allowing the donor to recover the ring.[9] Three rationales underpin this modern view: (1) because

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[5] 496 N.E.2d 869 (N.Y. 1986).

[6] *Id.* at 871.

[7] Speelman v. Pascal, 178 N.E.2d 723 (N.Y. 1961) (letter demonstrated donor's intent to make a present gift of 5% of future profits from the musical "My Fair Lady"); *see also* Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) (father intended the immediate transfer of a remainder interest in a painting to his son, even though the father retained a life estate).

[8] Vann v. Vehrs, 633 N.E.2d 102 (Ill. App. Ct. 1994) (agreement); Coconis v. Christakis, 435 N.E.2d 100 (Ohio County Ct. 1981) (recognizing rule, but finding no fault by donee).

[9] *See, e.g.*, Fierro v. Hoel, 465 N.W.2d 669 (Iowa Ct. App. 1990); Heiman v. Parrish, 942 P.2d 631 (Kan. 1997); Aronow v. Silver, 538 A.2d 851 (N.J. Super. Ct. Ch. Div. 1987) (condemning majority rule as "sexist and archaic"); Gaden v. Gaden, 272 N.E.2d 471 (N.Y. 1971); Lindh v. Surman, 742 A.2d 643 (Pa. 1999).

the engagement period is intended to allow a couple to test the permanency of their mutual feelings, the donor should not be penalized for avoiding an unhappy marriage; (2) it is extraordinarily difficult to assess fault in this setting; and (3) just as fault has become irrelevant to divorce proceedings, it should be irrelevant to breaking an engagement.

## [C] Delivery

### [1] The Requirement of Delivery

The second traditional requirement for the validity of a gift is delivery.[10] The United States inherited the English common law rule that words alone were insufficient to effect a gift of personal property. As a leading English decision explained: "[I]n order to transfer property by gift . . . there must be an actual delivery of the thing to the donee. Here the gift is merely verbal."[11] Under this early view, "delivery" meant physically handing over the chattel to the donee. Over time, three additional types of delivery have been accepted: constructive delivery, symbolic delivery, and delivery through a third person.[12]

Why require delivery at all? Its genesis is found in the feudal mindset which inextricably linked title and possession; title to a chattel could be transferred only by transferring possession. The requirement survived the centuries because—as Philip Mechem summarized in a famous article[13]—it arguably serves three policy goals. First, the donee's possession helps to demonstrate the donor's intent to make a gift. Second, the delivery requirement warns the donor about the legal significance of the act, preventing impulsive conduct that the donor might later regret. Finally, the donee's possession provides prima facie evidence that a gift was made.

English law recognized one exception to the delivery requirement: if title to a chattel was transferred by a *deed of gift,* manual delivery was unnecessary. In this context, a deed of gift meant a formal written instrument that:

(1) contained language reflecting the donor's intent to make a gift;

(2) described the subject matter of the gift;

(3) identified the donee; and

(4) was "sealed" (that is, bore a wax impression of the donor's personal seal).

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[10] *See, e.g.*, Irvin v. Jones, 832 S.W.2d 827, 827 (Ark. 1992) (finding no gift of certificates of deposit where the alleged donee had "retained sole possession of the certificates at all times and . . . never delivered them to appellants"); *see also* Irons v. Smallpiece, 106 Eng. Rep. 467 (R.B. 1819) (the landmark English decision imposing the delivery requirement).

[11] Irons v. Smallpiece, 106 Eng. Rep. 467, 468 (R.B. 1819).

[12] There are, of course, various exceptions to the delivery requirement (e.g., property already in the possession of the donee need not be delivered).

[13] Philip Mechem, *The Requirement of Delivery of Gifts in Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 Ill. L. Rev. 341 (1926).

The American reaction to this exception was mixed; some states followed the English approach, while others permitted the use of a deed of gift only if manual delivery was impractical. Since then, virtually all states have eliminated the traditional distinction between sealed and unsealed instruments. In light of this, would an unsealed, informal writing such as a letter obviate the need for manual delivery even if such delivery could easily be made? Certainly the main current of American law is flowing in this direction, though with a semantic twist. Rather than relying on deed of gift terminology, modern courts refer to the use of a writing as *symbolic delivery*.

## [2] Methods of Delivery

### [a] Manual Delivery

Traditionally, "delivery" connoted *manual delivery*, sometimes called *actual delivery*. In order to deliver an item of personal property, the donor physically transferred possession of the item to the donee. If the item was small and portable—like a ring—the donor usually handed it directly to the donee. For example, R, a guest at E's birthday party, delivers her wrapped present by placing it into E's outstretched hands. Manual delivery is the main method of delivery today for items of tangible personal property.

The limitations of manual delivery, however, are readily apparent. Some items of tangible personal property are too cumbersome and bulky to be handed to a donee (e.g., a large marble statue), while others may not be readily available (e.g., located in a distant state or pledged to a creditor). And manual delivery is impracticable when the donee receives less than complete title to the item (e.g., a one-tenth interest or a remainder interest). Finally, intangible personal property—by definition—cannot be manually delivered.

### [b] Constructive Delivery

All jurisdictions permit *constructive delivery* when manual delivery is impracticable or impossible. Under the conventional view, constructive delivery occurs when the donor physically transfers to the donee the means of obtaining access to and control of the property, most commonly by handing over a key. For example, in *Newman v. Bost*[14] the donor effected constructive delivery of a bureau and other household furniture by handing the donee the keys that unlocked these items. Similarly, buried coins are constructively delivered when the donor informs the donee of their location, while range cattle are deemed delivered when the donor rebrands them with the donee's brand.[15]

Suppose that R receives a check, endorses it in favor of her apartment roommate E, places it on the kitchen table during E's absence, and then

[14] 29 S.E. 848 (N.C. 1898).

[15] *See also* Braun v. Brown, 94 P.2d 348 (Cal. 1939) (delivery of key to safe deposit box was constructive delivery of contents). *But see In re* Estate of Evans, 356 A.2d 778 (1976) (contra).

abandons the apartment. Is this constructive delivery of the check to E? Because manual delivery of the check was possible, the traditional answer is "no." In the landmark decision of *Scherer v. Hyland*,[16] however, the New Jersey Supreme Court dramatically expanded the definition of constructive delivery and found a valid gift on these facts. As the *Scherer* court explained, this approach "would find a constructive delivery adequate to support the gift when the evidence of donative intent is concrete and undisputed, there is every indication that the donor intended to make a present transfer . . . and when the steps taken by the donor . . . must have been deemed by the donor as sufficient to pass the donor's interest."[17]

### [c] Symbolic Delivery

Most jurisdictions also permit *symbolic delivery* when manual delivery is difficult. Under this approach, an object that represents or symbolizes the gift is physically handed to the donee. Although in theory virtually any symbol might suffice (e.g., a Rolls-Royce hood ornament might symbolize the car), in practice this type of delivery is almost always effected by giving the donee some type of writing. In *Speelman v. Pascal*,[18] for example, the donor's letter giving the donee a share in future profits from the musical "My Fair Lady" was held an effective symbolic delivery.

The modern trend is to recognize an informal writing as symbolic delivery even when manual delivery is possible,[19] as evidenced by the well-known New York decision of *In re Cohn*.[20] There, the donor signed and dated a memorandum that recited "I give this day to my wife . . . five hundred shares of American Sumatra Tobacco Company common stock," but failed to hand over the stock certificates to her.[21] As the dissent protested, "there was no physical or other impossibility to the actual delivery of the stock."[22] Reasoning that the delivery requirement was intended to guard against fraud, mistake, or undue influence—and finding none—the majority found the memorandum to be effective symbolic delivery.[23]

### [d] Delivery to Third Person

Delivery of a gift may be effected through a third party intermediary. Suppose that R manually delivers a gold watch to T, with instructions that T in turn deliver it to E; T then hands over the watch to E. This is a complete

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[16] 380 A.2d 698 (N.J. 1977).

[17] *Id.* at 701.

[18] 178 N.E.2d 723 (N.Y. 1961).

[19] While most states reach this result through case law, others have adopted statutes that provide that symbolic delivery is always permitted. *See, e.g.*, Cal. Civ. Code § 1147.

[20] 176 N.Y.S. 225 (App. Div. 1919).

[21] *Id.* at 225.

[22] *Id.* at 232 (Page, J. dissenting).

[23] *See also* Gruen v. Gruen, 496 N.E.2d 869, 874 (N.Y. 1986) (letter from donor to donee constituted valid symbolic delivery of vested remainder in painting; physical delivery of painting to donee not required because "it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain").

gift. But which transfer constituted delivery: R's transfer to T or T's transfer to E? The answer turns on T's status. If T was an agent of R (and thus subject to R's control), then the gift was not complete until T handed the watch to E. Conversely, if T was an agent of E, the gift was complete when T obtained possession.

What if R changes her mind while T still possesses the watch and demands its return? The central question is again T's status. If T is R's agent, then the gift has never been completed and R may revoke it; but if T is E's agent, the gift is irrevocable.

It is well-settled law that the status of the third party intermediary turns on the donor's intent. Thus, the donor's express statement of intent at the time of the transfer to the intermediary is usually controlling (e.g., suppose R handed the watch to T, saying: "Hold this watch as trustee for E"). All too commonly, however, the donor's intent is unclear and must be judicially determined from the circumstances of the case.

A donor may use third party delivery to create a valid conditional gift. For example, assume that R hands the watch to T, saying: "Deliver this watch to E when he passes the state bar examination and hold it as his trustee until then." Because T is E's agent, the transfer to T constituted immediate delivery of the watch, completing the gift. But E is not entitled to possession of the watch until he passes the state bar examination.

### [3] Demise of the Delivery Requirement

Enforcement of the delivery requirement may defeat the donor's intent. Suppose that R tells her friend E, in the presence of ten witnesses: "I hereby give you the Rembrandt painting hanging on my living room wall; I wouldn't want my greedy nephew N to get it." E replies: "Thanks, I accept." Ignorant of the law, R fails to hand over the painting to E and dies the next day, leaving no will. Under the rules of intestate succession, all the property R owned at her death is inherited by N, her only living relative. Many courts would invalidate R's attempted gift on these facts due to lack of delivery and award the painting to N, even though R's contrary intent was clear.

The delivery requirement is slowly disappearing. Over 80 years ago, a farsighted legal scholar criticized delivery as a feudal anachronism and predicted its demise.[24] Since then, judicial expansion of constructive and symbolic delivery has eroded the traditional rule.[25] Thus, although the text of the Restatement (Third) of Property: Wills and Other Donative Transfers formally asserts that delivery is required,[26] one of the comments recognizes

[24] Harlan F. Stone, *Delivery of Gifts in Personal Property*, 20 Colum. L. Rev. 196 (1920); *see also* Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 Real Prop. Prob. & Tr. J. 357 (1996); Patrick J. Rohan, *The Continuing Question of Delivery in the Law of Gifts*, 38 Ind. L.J. 1 (1962).

[25] *See, e.g., In re* Drewett, 34 B.R. 316 (E.D. Pa. 1983) (finding a valid gift of diamond ring, even though donor continued to wear ring and never executed any writing).

[26] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 (2003) (providing that the required "transfer" may be made either by "delivering the property to the donee" or by "inter vivos donative document," that is, through symbolic delivery).

a special exception: "[T]his Restatement adopts the position that a gift of personal property can be perfected on the basis of donative intent alone if the donor's intent to make the gift is established by clear and convincing evidence."[27]

The law of gifts will remain unsettled while the delivery requirement lingers. In the interim, courts will continue the trend of subordinating delivery to intent. When evidence of donor intent is compelling, many courts will ignore delivery; if evidence of donor intent is weak, however, courts may rely on a lack of delivery to invalidate a gift.

### [D] Acceptance

The third element for a valid gift—acceptance by the donee—is easily established in almost all instances. Even absent any affirmative statements or conduct by the donee indicating acceptance, courts universally presume acceptance of a gift that is unconditional and valuable to the donee.[28] Thus, if R intends to give an antique vase to E and delivers it to him, E's acceptance of the vase is presumed. The gift will fail only if E expressly refuses to accept it.[29]

## § 5.04 Gifts Causa Mortis

### [A] General Rule

A gift causa mortis may be defined as a gift of personal property in anticipation of the donor's imminently approaching death.[30] Unlike a gift inter vivos, a gift causa mortis is revocable. The donor may revoke such a gift at any time before his death. In addition, if the donor does not die from the anticipated peril, the gift is automatically revoked as a matter of law.[31] A valid gift causa mortis requires all three gift inter vivos elements (intent, delivery, and acceptance) plus a fourth element: the donor's expectation of imminent death.[32]

The gift causa mortis is best viewed as an emergency substitute for a will. Suppose that D collapses and is rushed to the hospital by her niece N, where the doctor advises D that her death is only minutes away; there is insufficient time for D to prepare and execute a will. D privately hands

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[27] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 com. yy (2003).

[28] Scherer v. Hyland, 380 A.2d 698 (N.J. 1977); *see also* Restatement (Third) of Property: Wills and Other Donative Transfers § 6.1(b) (2003).

[29] Why might a donee like E refuse a valuable gift? Possible reasons include: (1) to avoid adverse tax consequences; (2) to thwart creditors; and (3) to avoid a moral obligation to the donor.

[30] Coley v. Walker, 680 So. 2d 352 (Ala. Civ. App. 1996).

[31] Most American courts view the gift causa mortis as a gift subject to a condition subsequent that the donor die from the anticipated peril.

[32] *See, e.g.*, Foster v. Reiss, 112 A.2d 553 (N.J. 1955) (attempted gift of money, bank account, and stock via decedent's handwritten note held invalid due to lack of delivery).

her diamond ring to N, saying: "I give you this ring." Under these circumstances, it makes sense to enforce D's gift.[33]

### [B] Donor's Anticipation of Imminent Death

Although the classic gift causa mortis occurs at the donor's deathbed, the doctrine also extends to other situations where death may be weeks or even months away. Most gift causa mortis decisions involve a donor confronting the substantial certainty of death in the near future from a particular illness or affliction, such as a cardiac patient about to undergo a risky operation. A gift made by a donor contemplating suicide may also meet this standard.[34] A donor's natural apprehension of death in the distant future, however, does not support a gift causa mortis.

### [C] Criticism of Doctrine

The typical gift causa mortis lacks the formal safeguards that the law requires for a valid will (e.g., a writing, disinterested witnesses). Thus, courts often view the doctrine with disfavor (and even hostility), fearing that it encourages fraud, perjury, and undue influence.[35]

For example, assume that after A dies, his brother B begins wearing A's valuable ring; when questioned, B asserts that A gave him the ring when they were alone in A's hospital room a few moments before A died. How can a court now determine if A actually intended a gift? In a case involving a claimed gift inter vivos, the donor is usually alive to testify concerning intent; if the donor is dead, evidence that the donee held long-term possession of the item without any objection allows an inference of donor intent. In contrast, here both A's testimony and evidence of A's acquiescence in B's possession of the ring are unavailable. B is the only witness to the alleged gift, raising concerns that his story is a tangle of lies. Or was the gift the product of undue influence that B exerted while A was in a highly vulnerable condition?

## § 5.05 Restrictions on Donor's Autonomy

Suppose that R exchanges some of his property for a stack of $100 bills and begins handing the bills to strangers passing by on the sidewalk. Assuming that the elements of intent, delivery, and acceptance are all present, the legal system will not question R's actions. The competing jurisprudential theories that underpin American property law agree that R has the right to give his property away to anyone he chooses.[36]

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[33] *See, e.g.*, Newman v. Bost, 29 S.E. 848 (N.C. 1898) (former manager of opera house, on deathbed and stricken with paralysis, made gift causa mortis to housekeeper).

[34] *See, e.g.*, Scherer v. Hyland, 380 A.2d 698 (N.J. 1977). In some states, however, a gift in contemplation of suicide is void as against public policy.

[35] *See, e.g.*, Newman v. Bost, 29 S.E. 848, 848 (N.C. 1898) (noting that the doctrine arose in an era when "[l]earning was not so general, nor the facilities for making wills so great then as now").

[36] Moreover, public policy encourages charitable donations, as evidenced by the charitable deduction available under the Internal Revenue Code.

Statutory exceptions have somewhat eroded this general rule in extreme situations. For example, elderly parent P cannot freely give away assets to her child C in order to impoverish herself and thus qualify for federal Medicaid benefits.[37] Similarly, most states restrict lifetime gifts by one spouse that are intended to nullify the property rights that the law accords to a surviving spouse (*see* § 11.03[D]).

[37] 42 U.S.C. § 1396p(c); *see also* Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & Pol. 195, 219–27 (1996).

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# Property

Ninth Edition

Steven L. Emanuel

Wolters Kluwer

# V. GIFTS

**A. Definition of gift:** A gift is the voluntary transfer of property by one person to another without any consideration or compensation.

**1. Present transfer:** A gift is a present transfer of property. If the gift is to take effect only in the future, it is a mere promise to make a gift, and is unenforceable as a contract because of its lack of consideration.

**2. Inter vivos vs. causa mortis gift:** We do not discuss gifts of property by will in this chapter. The gifts that we consider here fall into two categories: (1) gifts "inter vivos" and (2) gifts "causa mortis". An inter vivos gift is an ordinary one in which the donor is not responding to any threat of death. A gift causa mortis is one made in contemplation of immediate approaching death.

Most of the rules governing the two classes of gifts are the same, but where there are differences, these are noted below.

The principal difference is that an ordinary gift inter vivos is not revocable once made (i.e., the donor cannot "take back" the gift, as a matter of law) but the gift causa mortis is automatically revoked if the donor escapes from the peril of death which prompted the gift.

**3. Requirements:** There are three requirements for the making of a valid gift (whether inter vivos or causa mortis): (1) there must be a delivery from the donor to the donee either of the subject matter of the gift, or of a written instrument embodying the terms of the gift; (2) the donor must possess an intent to make a gift; and (3) the donee must accept the gift.

**B. Delivery:** The essence of the requirement of delivery is that control of the subject matter of the gift must pass from the donor to the donee.

**1. Rationale:** The main rationale for the requirement of delivery is that without such a requirement, gifts would be enforceable even if the only evidence showing they had been made was an oral statement on the part of the alleged donor.
This would leave people open to ill-founded and fraudulent claims of gift. Therefore, courts require delivery as additional proof that a gift was really intended and made.

**2. Symbolic and constructive delivery:** There are some types of personal property which because of their nature cannot be physically delivered (e.g. certain intangibles, such as the right to collect a debt from another person).

There are other types of personal property which, while theoretically capable of manual delivery, would be highly inconvenient to deliver (e.g. heavy furniture.)

Yet to dispense with the requirement of delivery altogether in such cases would leave alleged donors open to false claims that a gift had been made.

Accordingly, the courts have adopted a middle position in such cases, and permit "symbolic" or "constructive" delivery. (A delivery is symbolic if, instead of the thing itself, some other object is handed over in its place.

A delivery is constructive if the donor delivers the means of obtaining possession and control of the subject matter, rather than making a manual transfer of the subject matter itself. )

***a. Difficult or impossible to make manual transfer:*** Constructive or symbolic delivery will not be allowed unless delivery of the actual subject matter would be impossible or impractical.

***b. Dominion must be surrendered:*** Also, a symbolic or constructive delivery will not be effective unless the donor has parted with dominion and control of the property.

***c. Use of key:*** The delivery of a key to a locked receptacle will often constitute adequate constructive delivery of the receptacle's contents. Use of the key will be upheld whenever the manual transfer of the contents would be impractical or inconvenient.

Example: O is paralyzed and confined to his bed. O gives various keys to P (his housekeeper), telling her that everything in the house is hers. The keys unlock several items of heavy furniture, including a bureau in which a life insurance policy on O's life is found.

Held, the delivery of the keys constituted constructive delivery of the items of furniture themselves, since the weight and bulk of these items made actual manual delivery nearly impossible.

But the keys did not constitute constructive delivery of the insurance policy, because the policy could have been manually delivered (e.g., by O's telling his nurse to hand the policy to O, who could have then handed it to P). Newman v. Bost, 29 S.E. 848 (N.C. 1898).

***d. Intangibles:*** Often the subject matter of a gift is an intangible, i.e., a claim of some sort against another person. Since the claim itself cannot be physically transferred, the courts are compelled to recognize constructive or symbolic delivery.

i. Document as embodiment of claim: Some types of intangibles have a document so closely associated with them that the document is treated as the embodiment of the claim. The business custom is to assign the obligation by transferring the document, and by surrendering the document to the obligor when the obligation has been satisfied. Any negotiable instrument falls within this class (e.g., promissory notes, bonds, bills of lading, etc.). Also usually considered within this class are stock certificates, insurance policies and savings bank account passbooks. Therefore, as to all these items, courts hold that delivery of the document is sufficient to constitute delivery of the intangible claim represented by it.

ii. Savings accounts: In some situations, a gift of the contents of a savings account may be made even without delivery of physical possession of the savings passbook to the donee; the issue of bank accounts is discussed further infra.

**3. Written instrument:** Virtually all courts hold that delivery to the done of a written instrument under seal stating the particulars of the gift constitutes sufficient delivery.

***a. Unsealed instrument:*** Where a written instrument is given to the donee, but it is not under seal, the courts are split. Most courts hold that even an unsealed instrument is a valid substitute for physical delivery of the subject matter of the gift, assuming the instrument is a clear symbol of the right to possess the subject matter.

Example: O writes to his son, P, that O wishes to give P his valuable Klimt painting, but that O wishes to retain possession of the painting for his lifetime. Held, this letter (together with other correspondence between O and P) sufficed to meet the delivery requirement, and physical delivery of the painting itself was therefore not required. Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986), discussed more extensively.

**4. Gifts causa mortis:** Courts are generally hostile to gifts causa mortis, i.e., made in contemplation of the donor's death. Therefore, they frequently impose stricter requirements for delivery in such cases than where the gift is made inter vivos with no expectation of death.

Courts have been more likely to require actual physical delivery in such cases, at least if the property is capable of readily physical delivery.

***a. Revocation:*** One essential feature of a gift that's determined to be causa mortis is that if the donor does not die of the contemplated peril, the gift may be revoked. In fact, most courts hold that the failure of the donor to die from the contemplated peril automatically revokes the gift, even if the donor indicates a desire that the gift remain valid.

***b. Contemplation of death:*** The gift causa mortis, as noted, is one made in contemplation of death. In any case where the donor dies shortly after making the gift, the court will presume that the gift is causa mortis, unless the donee comes forward with evidence that the donor was not acting in contemplation of death.

And, as noted, once the court decides the gift is causa mortis, the court is likely to impose strict physical delivery requirements.

i. Rationale: Why do courts impose stricter delivery requirements for gifts causa mortis than other gifts?

Because courts worry that if they don't do this, such gifts will interfere with statutes requiring that wills meet certain formalities (e.g., attestation) to reduce fraud.

That is, the fear is that a claimant will falsely say, "He gave me a gift of [item X] just before he died, but he told me I couldn't take possession until after his death." Since oral gifts (unlike oral wills) are valid, if there's no requirement of physical delivery the opportunity for false claims is large.

ii. Portable: Courts are especially skeptical of the validity of a gift causa mortis without physical delivery where the item is portable (e.g., a document), so that the donor/decedent could easily have made physical delivery if she had wanted to.

**C. Donor's intent to give:** In addition to a delivery, there must be an intent on the part of the donor to make a gift. Obviously, if A hands B A's diamond ring and says "Take care of this for me until I ask for it back," there has been no gift even though there has been a delivery.

**1. Intent to make present gift:** Furthermore, the intent must be to make a present transfer, not one to take effect in the future.

**2. Present gift of future enjoyment:** However, courts generally go out of their way to find that there has been a present gift of the right to the subject matter, with only the enjoyment postponed to a later date. In the case of personal property (as with real property), there may be a present transfer of title, with the right of enjoyment postponed until a future date.

***a. Gift subject to life estate:*** For instance, most courts hold that a donor may make a valid gift of a future interest in personal property, subject to the donor's life estate.

In this situation, even though the donor does not immediately deliver the subject matter of the gift to the donee, the intent to make a present gift will usually be found to have been satisfied.

Example: In 1963, O writes a letter to his son, P, saying that O is giving P his valuable Gustav Klimt painting for P's birthday. The letter says, however, that O wishes to retain possession of the painting for O's lifetime. A subsequent letter by O to P similarly refers to O's intent to make a present gift of the painting to P, subject to O's right to lifetime possession.

The painting remains in O's possession until his death in 1980, at which time D, P's stepmother, refuses to turn the painting over to P. D contends that:

(1) O never intended to make an ownership transfer in 1963, but only expressed the intent that P would get the painting on O's death; and

(2) if physical delivery of the subject of the gift is possible, such delivery (rather than delivery of a written instrument) must take place for the gift to be valid.

Held, for P. As to argument (1), it is true that the donor must intend a present gift (not a future gift), but here there was clear evidence of O's intent to make a present transfer of a remainder interest in the painting (subject to O's life interest).

As to argument (2), the very purpose of the remainder-subject-to-a-life-interest structure used by O was to permit O to keep possession of the painting during his lifetime, so it would be illogical (and therefore not required) for O to deliver the painting to P; therefore, a written instrument was enough to meet the delivery requirement. Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986).

**D. Acceptance:** Courts usually hold that the giving of a gift is a bilateral transaction requiring an acceptance of the gift on the part of the donee.

However, at least if the gift is a beneficial one, the court will presume that the donee intended to accept.

**1. Donee unaware:** The issue usually arises where the donor gives the property to a third person to be held until it is given to the donee; if the donor dies before the donee ever learns of the gift, it can be argued that the gift was invalid for lack of acceptance (since the gift could obviously not have been made after the donor died.)

However, the courts have usually held that the gift took effect immediately upon its execution by the donor, subject to the donee's right to repudiate it subsequently.

So long as no repudiation occurs after the donor's death, the gift is valid.